Advice Memorandum

DATE: February 13, 2009

TO   : Stephen M. Glasser, Regional Director
         Region 7

FROM   : Barry J. Kearney, Associate General Counsel
         Division of Advice

SUBJECT: Detroit Police Officers Association   512-5009-1500
         Case 7-CA-51469   512-5072-5700
                                                      512-5012-0133

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by threatening to pursue legal action against a former employee because she breached the terms of a confidentiality provision contained within a grievance settlement agreement.

We conclude that the Employer did not violate the Act by threatening to pursue legal action against the employee for breaching the terms of the confidentiality provision because the provision was a valid waiver of the employee's Section 7 right to disclose the agreement to other employees.

FACTS

On July 28, 2006, the Employer entered into an agreement ("Agreement") with employee Heintz and the Union[1] settling a grievance that Heintz had filed in response to her termination. The Agreement provided that Heintz would resign and waive all rights of returning to work. In exchange, the Employer agreed to place Heintz on a one-year leave of absence [*FOIA Exemptions 6 and 7(C)*
.] The Agreement contained the following confidentiality provision:

> **V.   Confidentiality**
>   Employee agrees to keep the existence and terms of this Agreement confidential, and to refrain from revealing any of its terms and conditions to anyone other than spouse, legal counsel, accountant, tax advisor or as required by law or as agreed in writing by the Employer and the Union in connection with the legal process.

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[1] The International Brotherhood of Teamsters, Local 299.

The Agreement also contained Heintz's representation that
she had been "fully, fairly and effectively represented by
the Union."

On March 9, 2007, employee Sparks took a medical leave
of absence [*FOIA Exemptions 6 and 7(C)*   .] By
letter of May 12, 2008,[2] the Employer wrote Sparks that due
to her inactive employment status, the Employer was
terminating her health insurance coverage. On June 6,
Sparks filed a grievance protesting the loss of insurance
benefits.

On July 21, the Industrial Board Arbitration Committee
("IBAC")[3] held a hearing on Sparks's grievance, then
postponed processing the grievance pending resolution of
her workers' compensation claim. By letter of July 30,
Sparks wrote to IBAC protesting the postponement and
stating that the Employer "has always covered their
employees' health insurance to avoid hardships in the
past." To support this assertion, Sparks attached a copy
of Heintz's Agreement. Sparks explained that Heintz "just
recently gave me the copies [of the Agreement] and gave
permission to show it at the hearing."

By letter of August 14, the Employer's counsel
informed Heintz:

> It has come to the attention of the [Employer]
> that you have made unauthorized disclosures of
> both the contents and a copy of the Settlement
> Agreement and Release dated July 28, 2006. Your
> actions are serious and material breaches of the
> Agreement . . . The [Employer] is reviewing the
> available legal sanctions that will be pursued
> against you for your violations of the Agreement.
> The [Employer] reserves the right to exercise any
> and all such available options and will hold you
> liable for any damages that result from your
> improper actions.

ACTION

We conclude that the Employer did not violate Section
8(a)(1) by threatening to pursue legal action against the
employee for breaching the terms of the confidentiality
provision because the provision was a valid waiver of the

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[2] Hereinafter, all dates are 2008 unless otherwise
indicated.

[3] IBAC is a joint union-management arbitration committee.

employee's right to disclose the agreement to other
employees.

    Employees have a Section 7 right to discuss their
working conditions, including their discipline and
discharge, with fellow employees.[4] However, an employer and
employee, in settling the employee's unfair labor practice
or grievance claim, may lawfully enter into an agreement
whereby the employee agrees not to disclose the settlement
to other employees.[5] Such provisions are valid waivers of
an employee's Section 7 rights provided that they are
sufficiently narrow in scope, i.e., they do not unduly
restrict the Section 7 rights of the signatory employee or
infringe on those of other unit employees.[6] The Board has
held that confidentiality provisions were not valid waivers
where they failed to limit themselves to the specific claim
of the employee who entered into the agreement;[7] prevented

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[4] See, e.g., SNE Enterprises, Inc., 347 NLRB 472, 492
(2006); Caesar's Palace, 336 NLRB 271, 272 (2001).

[5] See P*I*E Nationwide, 282 NLRB 1060, 1064 (1987), enfd.
894 F.2d 887 (7th Cir. 1990) (employee may lawfully refuse
to disclose terms of a settlement agreement containing
confidentiality provision); York International Corp., 290
NLRB 438, 439-40 (1988) (employer did not violate Section
8(a)(5) by refusing to provide union information contained
in private settlement between employer and an employee
where the employee waived all contractual and
discrimination claims related to his discharge).

[6] See Hughes Christensen Co., 317 NLRB 633, 634-635 (1995),
enf. denied on other grounds, 101 F.3d 28 (5th Cir. 1996)
(ulp settlement agreement in which employees waived their
right for claim to relief under the Act met the standards
for a private non-Board settlement and effectuated the
public interest in encouraging private settlements); First
National Supermarkets, 302 NLRB 727, 727-28 (1991).
Compare Metro Networks, Inc., 336 NLRB 63, 67 (2001)
(employer's proposed severance agreement, which contained
overly broad non-assistance and non-disclosure provisions,
"unlawfully chill[ed]" the Section 7 rights of all
employees).

[7] Clark Distribution Systems, 336 NLRB 747, 749-50 (2001)
(settlement agreement's nondisclosure clause unlawful where
it was not limited to claim of the employee who entered
into it). Compare First National Supermarkets, 302 NLRB at
727-28 (grievance waiver and release agreement lawful where
it was limited to employee's past employment and did not
restrict employee's right to file grievances or unfair

the employee generally from communicating with other employees about terms and conditions or from assisting other employees in matters arising under the Act or before the Board;[8] or precluded the union from sharing relevant information concerning terms and conditions of employment with other employees.[9] With respect to provisions in contractual grievance settlements, the Board also considers whether the union had full knowledge of the confidentiality provision.[10]

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labor practice charges stemming from possible future incidents).

[8] Metro Networks, Inc., 336 NLRB at 67 (confidentiality provision unlawful because it prevented the employee from communicating with anyone about his employment, assisting other employees in matters arising under the Act, or voluntarily disclosing information to the Board); Clark Distribution Systems, 336 NLRB at 750 (confidentiality provision unlawful because it prohibited the employee from providing evidence to the Board in its investigation of charges involving other employees). See also AT&T Advertising and Publications, Case No. 14-CA-29051, Advice Memorandum dated February 29, 2008, in which Advice concluded that a confidentiality provision was lawful because it did not prevent the employee from discussing her employment or assisting other employees with regard to alleged violations of the Act.

[9] See Legal Services of Northern California, 352 NLRB No. 66, slip op. at 4 (2008) (employer violated Section 8(a)(5) by refusing to provide the union with a copy of grievance settlement agreement that waived collective-bargaining rights and was entered into without the union's participation or knowledge); Top Manufacturing Co., 249 NLRB 424, 426 (1980) (employer violated Section 8(a)(5) by failing to notify the union about the grievance settlement agreement or to give the union the opportunity to be present during settlement discussions).

[10] See United States Postal Service, 281 NLRB 1015, 1015-16 (1986) (whatever validity the confidentiality requirement may have had in general did not outweigh the union's clear statutory right; although Section 9(a) gives individual employees the right to present and adjust grievances with management, the second proviso to that section guarantees to the bargaining representative an opportunity to be present at the adjustment of grievances). Cf. York International Corp., 290 NLRB at 440 (employer did not violate Section 8(a)(5) by refusing to reveal contents of grievance settlement to union pursuant to the agreement's confidentiality clause where the information sought was not

Applying the above principles, we conclude that the instant confidentiality provision constitutes a valid waiver of employee Heintz's Section 7 right to disclose the Agreement to other employees. The confidentiality provision applies only to the existence and terms of the Agreement itself; it does not preclude Heintz from discussing any other employment terms and conditions with unit employees, including the circumstances that led to her discharge; and it does not prevent Heintz from assisting other employees or the Board with regard to any unfair labor practice charges. Further, the Union was a party to the Agreement and thus had full knowledge of the Agreement and its terms. Moreover, the provision does not prevent the Union from sharing the Agreement or its terms, or any other relevant information regarding terms and conditions of employment, with bargaining unit employees.

In sum, we conclude that the confidentiality provision was a valid waiver of Heintz's right to disclose the Agreement to other employees. Therefore, the Employer did not violate Section 8(a)(1) of the Act by threatening to pursue legal action against the employee for disclosing the terms and existence of the Agreement. Accordingly, the Section 8(a)(1) allegation should be dismissed, absent withdrawal.

B.J.K.

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relevant to the union's ability to represent other employees).